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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL JIMENEZ,

Defendant and Appellant.

B198722

(Los Angeles County
Super. Ct. No. TA081626)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant Abel Jimenez of first degree murder. The jury found true all allegations against defendant, including that defendant personally and intentionally discharged a firearm causing death and that the crime was committed for the benefit of a criminal street gang. (Pen. Code, §§ 12022.53, subd. (d); 186.22, subd. (b)(1)(c).)

Defendant appeals from the judgment following his conviction of first degree murder. Defendant makes two arguments on appeal. First, he argues the trial court abused its discretion when it allowed the People to present defendant's postarrest recorded interview. Second, defendant argues that CALCRIM No. 103 misstates the concept of "proof beyond a reasonable doubt" and, therefore, its use at trial violated his constitutional right to due process.

We conclude (1) the trial court did not abuse its discretion in allowing the use of defendant's recorded interview, and (2) the trial court did not violate defendant's constitutional rights by instructing the jury with CALCRIM No. 103. Accordingly, we affirm the judgment.

BACKGROUND

The criminal street gang known as "Young Crowd" operates in the City of Lynwood. Prior to defendant's arrest in this case, sheriff's deputies had stopped and talked to defendant on multiple occasions on the streets of Lynwood. Following these "stop and talks," the deputies filled out field interview ("F. I.") cards, describing their encounters with defendant, including, for example, his gang membership and the location of the stop and talk. The F. I. cards indicated that four stop and talks with defendant occurred on Louise Avenue in the City of Lynwood. One such stop and talk on Louise Avenue occurred the evening of August 26, 2005. At 6:45 that evening, Deputy Henggeler stopped and talked to defendant, who identified himself as a member of Young Crowd who went by the name "Ghost."

Approximately five hours after this stop and talk, Armando Ramos, a Louise Avenue resident, heard noises outside his home. He went outside and saw two men walking away with his apartment unit's fire extinguisher, which was stored outside the apartment. He asked them to leave the extinguisher, but they ignored him and left. A few minutes later, the men returned with two other men. Two men from the group approached Ramos, telling him they were "from Young Crowd."

A short time later, Melvin Espinoza, who had been inside the apartment, joined Ramos outside. Gloria Marroquin and Espinoza's girlfriend Valerie Briseno, who had also been inside the apartment that night, came outside behind Espinoza. The two women stayed outside only a few moments before going back inside at Espinoza's behest. The men queried Espinoza as to his gang affiliation and nickname (Ramos testified he had known Espinoza for 8 or 9 years, and had never known him to be a member of any gang), then one of the men pulled a gun from his pocket and shot Espinoza in the face, killing him.

During the investigation of Espinoza's murder, detectives showed Ramos and Briseno "six-packs" of photographs in an effort to identify the killer. From these six-packs, Ramos identified defendant and one other man as the person who may have shot and killed Espinoza. Although she was not certain, Briseno identified defendant as one of the men she saw outside the Louise Avenue apartment the night of the murder.

At both the preliminary hearing and at trial, Ramos identified defendant as the person who shot and killed Espinoza. At trial, although again not absolutely certain, Briseno identified defendant as resembling one of the two men she saw talking to Ramos and Espinoza outside the Louise Avenue apartment the night Espinoza was killed. Briseno did not testify at the preliminary hearing.

Detective Castillo interviewed defendant after his arrest. During this interview, defendant repeatedly denied knowing anything about the murder and denied being on Louise Avenue that night. Defendant also denied "hanging out" in the Louise Avenue area. Over defendant's *Miranda* and Evidence Code section 352 objections, the trial court allowed the audio recording of that interview to be played to the jury.

Dr. Robert Shomer testified for the defense. Dr. Shomer is a psychologist specializing in eyewitness identification. He testified generally as to factors that can interfere with identifications, and specifically as to weaknesses he perceived with identifications made in this case. Defendant's father also testified for the defense. Defendant's father testified that he helped remove his son's gang-related tattoos because his son did not want to associate with Young Crowd. He also testified that, to the best of his recollection, his son was home the night of the murder. Defendant did not testify at trial.

The jury returned a guilty verdict and found all the allegations against defendant to be true. Defendant was sentenced to state prison for 50 years to life.

DISCUSSION

1. Defendant's Recorded Interview

Defendant argues that the trial court erred in failing to exclude his recorded interview under Evidence Code section 352. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review the trial court's ruling under the abuse of discretion standard. (*People v. Tafoya* (2007) 42 Cal.4th 147, 174.) Having listened to the recorded interview, we conclude the trial court did not abuse its discretion in admitting the interview.

Defendant's statements to Detective Castillo were relevant because they tended to show defendant's consciousness of guilt. "[F]alse statements by a defendant are admissible to demonstrate consciousness of guilt." (*People v. Hughes* (2002) 27 Cal.4th 287, 335, fn. omitted. See also *People v. Kimble* (1988) 44 Cal.3d 480, 496.) "Deception, falsehood, and fabrication as to the facts of the case are treated as tending to show consciousness of guilt, and are admissible on the same theory as flight and concealment of the person when charged with crime." (*People v. Cole* (1903) 141 Cal. 88, 90.)

Defendant's statements were introduced toward the end of the People's case. Sheriff's deputy Henggeler had already testified that he had stopped and talked with defendant on Louise Avenue the evening of the murder. Other witnesses had already testified about the multiple F. I. cards, showing defendant did "hang out" in the Louise Avenue area. And Ramos had already identified defendant as the shooter. If credited, this evidence demonstrates that defendant's statements to Detective Castillo were false.

The probative value of defendant's interview with Detective Castillo was not substantially outweighed by any undue prejudice or possible confusion. Defendant argues the interview was unduly prejudicial because, during the interview, defendant stated he would have his lawyer "prove you guys wrong." According to defendant, his reference to an attorney "import[ed] against [defendant] all the commonplace prejudices people hold against attorneys" and unconstitutionally shifted the legal burdens, lightening the prosecution's burden to prove guilt beyond a reasonable doubt. This argument lacks merit. The jury was properly instructed that "[a] defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegation beyond a reasonable doubt." The trial court also instructed the jury that it was the People's burden to prove each element of murder and murder in the first degree, as well as all enhancement allegations against defendant. Although defendant takes issue with the trial court's definition of reasonable doubt (discussed below), defendant does not and cannot argue that the jury was improperly instructed on his presumption of innocence or that the trial court failed to make clear that it was the People's burden to prove all charges and allegations against defendant.

Defendant also argues that the People improperly used the recorded interview to "tip the scale against" defendant by encouraging the jury to infer guilt from defendant's manner and tone during the interview. This argument is equally without merit. Defendant cites no authority for this position. We cannot decipher a sound reason why the jury should not be permitted to hear and assess defendant's tone or attitude during his interview. Such an assessment is decidedly within the realm of the fact-finder. (See, e.g., Evid. Code, § 780.)

In addition, to the extent defendant argues the interview was improperly used to show bad character because his attitude and demeanor during the interview was typical of a gang member, the jury was instructed not to “conclude from [any gang activity] evidence that the defendant is a person of bad character or that [he] has a disposition to commit crime.”

2. CALCRIM No. 103

Defendant argues that, by using CALCRIM No. 103 (the substantive equivalent to CALCRIM No. 220 for present purposes), the trial court incorrectly instructed the jury on the definition of proof beyond a reasonable doubt. Defense counsel made this same argument in *People v. Zepeda* (2008) 167 Cal.App.4th 25, 29. We reject the argument for the same reasons the court in *Zepeda* rejected it. (*Id.* at pp. 28-32.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TUCKER, J.^{*}

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*

Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.